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IN THE
Supreme Court of the United States

ALEXIS WITT, ON BEHALF OF THE ESTATE OF DEAN WITT, DECEASED,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Few cases still on the books have received as much opprobrium from judges and commentators as *Feres v. United States*. As the district court below opined, "now is the time to revisit the *Feres* doctrine." App. 7a.

The government is mistaken that reconsidering *Feres* "would particularly disserve the goal of maintaining a stable judicial system." Opp. 5. Twenty-five years is sufficient to conclude that *Johnson* did not settle the confusion *Feres* created. Calls among federal judges for this Court to reconsider *Feres* have grown more insistent since *Johnson*. *See* Pet. 21-22. Further extensions of this judge-made immunity rule merely engender disrespect for this Court.

The government does not contest that the petition raises important issues for service members. Nor does it identify any concern about this case as a vehicle for reconsidering *Feres*. Indeed, this case presents an opportunity to reexamine the *Feres* doctrine from broad or narrow perspectives. The Court can overrule *Feres* entirely, leaving the FTCA as Congress wrote the statute; it can overrule *Feres* as applied to medical malpractice cases, where the ostensible rationales for *Feres*'s "incident to service" test carry little weight; or it can overrule *Feres* as applied to service members injured by government negligence while on leave or who suffer wrongful death (so that a civilian is bringing suit), because the *Feres* rationales hold even less sway in those contexts. In this case, the government's negligence is straightforward; all that separates the Witt family from the recovery that Congress promised under the FTCA is continued fealty to the *Feres* judge-made immunity rule.

1. The government's principal argument against certiorari is *stare decisis*. Opp. 4-10. That argument goes more to the merits of whether *Feres* should be overruled in whole or in part than to whether this case presents an appropriate opportunity for this Court to evaluate the stability of *Feres* and *Johnson* as precedents worthy of continued adherence even though wrongly decided. Notably, the government nowhere urges *stare decisis* on the basis of any reliance interests. Nor could it. Unlike substantial reliance interests that have evolved in response to some statutory interpretations now understood to be erroneous, no such interests exist in this context. *Compare, e.g., Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) (overruling a statutory interpretation on which public and private reliance has evolved "would dislodge settled rights and expectations or require an extensive legislative response"). The government merely obtains unjustified windfalls through immunity from suit for negligent acts that fall outside enumerated FTCA exceptions to liability.

Second, raising another argument that relates more to the merits than cert worthiness, the government observes (at 4-6) that Congress could alter *Feres*, but has not done so. While this Court has invoked that reason for statutory *stare decisis*, it runs headlong into a line of cases recognizing "the dangers of inferring congressional intent from legislative inaction." Gen. Tucker Amicus Br. 21-23 (collecting cases and authorities). Indeed, a significant separation-of-powers concern arises when the Court assumes that all statutory interpretations should be given *stare decisis* effect simply by congressional

inactivity. *See, e.g.*, *Johnson v. United States*, 481 U.S. 681, 703 (1987) (Scalia, J., dissenting).[1]

Third, the government urges (at 9-10) that this Court should be reluctant to upset *Feres* because lower courts have applied it in a few select areas, such as to Public Health Service ("PHS") officials and to foreign nationals serving in their own country's military service who are injured in joint military operations in the United States. But PHS officials are part of the "uniformed service," 42 U.S.C. § 201(p), so the same rules apply to PHS personnel as to active-duty military service members. And citation to a single court of appeals case decided nearly 30 years ago hardly supports the claim that an aspect of the law regarding tort recovery by foreign service members will be unsettled by this Court's reconsideration of *Feres*.[2]

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[1] The government's argument (at 7 n.2) that Congress has acted "based on the understanding that *Feres* governs" rests not on any statutory language, but rather on a House committee report, a source this Court has discounted for its dubious weight. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2006) (explaining problems with "judicial reliance on legislative materials like committee reports").

[2] *United States v. Stanley*, 483 U.S. 669 (1987), which the government also cites (at 9), is based on a rationale entirely distinct from *Feres*. Justice Scalia's opinion for the *Stanley* Court articulated a "policy judgment," 483 U.S. at 681, that a *Bivens* claim should not be inferred when it would entail "congressionally uninvited intrusion into military affairs by the judiciary," *id.* at 683. The opinion observed that the Court "might [feel] freer" to permit FTCA actions in the military context, because the FTCA contains "an explicit congressional authorization for judicial involvement that [is], on its face, unqualified." *Id.* at 681; *see also id.* at 682 n.5 (equating *Stanley* with Justice Scalia's dissent in *Johnson*).

Fourth, the government overlooks that the *Feres* Court judicially implied a substantive defense to a congressionally created right of action. Just as this Court no longer implies private rights of action, *see, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) ("[T]his Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases"), it should not be implying or extending substantive defenses to statutory causes of action, *see* Gen. Tucker Amicus Br. 18-21.

Fifth, unlike the malpractice cases decided with *Feres*, which involved acts of medical negligence to active-duty service members attached to units, this case further extends the *Feres* doctrine by denying recovery to a service member conceded to be on a three-month transfer between units.[3] As *Feres* itself acknowledged, in *Brooks v. United States*, 337 U.S. 49 (1949), this Court upheld FTCA liability against the government when "Brooks was on furlough, driving along the highway, under compulsion of no orders or duty and on no military mission." 340 U.S. at 146. SSgt Witt's status was functionally indistinguishable from Brooks's when he was injured. This case therefore involves a tension between two of this Court's precedents, which only this Court can resolve.

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[3] The complaint's allegations, which must be accepted as true at this stage of the litigation, assert that "Dean Witt was not scheduled to report to his commander for his new assignment until October 30, 2003 and had no official military duties at any time relevant to this claim." Compl. ¶ 6.3. Although not alleged in the complaint, counsel understands that SSgt. Witt also was on personal leave for the birth of his son at the time of his injury.

Finally, the government's argument (at 8-9 & n.4) that the law is especially well settled in the malpractice context is unpersuasive. The "evidence" the government marshals instead highlights why *Feres* should be reconsidered. The fact that civilians, including service members' dependents, recover for identical acts of malpractice heightens the irrationality of applying *Feres* in this context, as the lower courts recognize. Since *Johnson*, they have continued to urge this Court to reconsider *Feres* (*see* Pet. 21-22), a point the government ignores. The notion that *Feres* offers a "straightforward rule of decision" (Opp. 7) is especially unpersuasive in light of the lower courts' struggles to apply the doctrine in differing circumstances. *See* Pet. 6-18.

2. The government denies the existence of confusion in the lower courts by asserting that "the fundamental inquiry is whether the service member's injury arose out of activity 'incident to service.'" Opp. 10. That assertion evades the problem. "Incident to service" is nowhere defined in the FTCA *because that phrase does not appear in the FTCA*. Whenever courts invent rules and standards that Congress neither sanctioned nor defined, judges invariably introduce their own policy predilections. That is why the government's confidence in the "fact-specific approach" (Opp. 10) is so misplaced. The *Feres* doctrine spawns such controversy because "incident to service" has no natural meaning and a "fact-specific approach" offers no guidance to litigants or courts. The government's examples (Opp. 11) of lower-court divisions over "the service member's duty status at the time he or she was injured" (*id.*), "the activity in which the service member was involved" (*id.*), "whether the service member's conduct was

subject to military regulations" (*id.*), and "whether the service member's activity arose out of military life or was a benefit of military service" (*id.*) prove *our* point: those divisions have arisen from the original mistake of *Feres* to engraft an "incident to service" defense that Congress did not enact. Rather than denying this petition and exacerbating the harm of *Feres* through further judicial rule-making, the Court should reconsider the propriety of the entire exercise that *Feres* unleashed.

That conclusion follows from the government's tortured attempts to deny the conflicts on a range of issues that flow from *Feres*'s "incident to service" test. The government concedes that a service member's child can recover when receiving negligent treatment directly (Opp. 13), even though she was treated in a military medical facility as an "incident to" her parent's military service. Likewise, no rational basis exists for giving a service member a right to recovery when a child is treated negligently, while denying recovery when the service member is the recipient of negligent care. *See* Pet. 11-14 (collecting cases). All the proffered concerns (questioning military authority, unit discipline, testimony of faraway doctors) arise when service members sue for medical malpractice on behalf of injured family members.

The government's attempt (at 13-14) to reconcile the recreational-injury cases also supports granting certiorari. As a corollary to a made-up "incident to service" test, the government rationalizes one line of cases as reflecting a "military function" sub-test. Under *Regan v. Starcraft Marine LLC*, 524 F.3d 627 (5th Cir. 2008), for example, the government faces liability for injury to a service member who is on

a boat rented by another service member from a military recreational facility. Because the military recreational facility permitted civilians to be guests on the boats rented by military personnel, the government explains (at 14) that the injured service member was not performing a "military function" in that case. Yet in *Costo v. United States*, 248 F.3d 863 (9th Cir. 2001), and *Bon v. United States*, 802 F.2d 1092 (9th Cir. 1986), the injured service member enjoying recreation was barred under *Feres* because the activities were "under military control." Opp. 14. Evidently, the "military recreational facility" at issue in *Regan* is somehow not "under military control" even though it is a "military recreational facility." *Id.* The tortured quality to the government's effort to reconcile the cases merely highlights why this Court should either clarify further the elusive meaning of "incident to service" or do away with the test.

The government offers no realistic way to resolve the issues raised by *Feres*-created inconsistency. In *Johnson*, the dissent noted that the petitioner had not asked for *Feres* to be overruled. Because petitioner here preserved from the outset of the litigation the question whether *Feres* should be reconsidered, this case presents an appropriate opportunity for this Court to do so.

3. The government's arguments that *Feres* was "correctly decided" (Opp. 16) ring hollow. It invokes the same post-*Feres* modified rationales discussed in *Johnson* and rebutted comprehensively by the *Johnson* dissenters. First, the government asserts that it is illogical to make the situs of the negligence affect the "liability of the Government to [the] serviceman." *Id.* (quoting *Johnson*, 481 U.S. at 689). Yet Congress already found the logic in that rule when it linked

the choice of law under the FTCA to "the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1); *cf. id.* § 2680(k) (expressly excepting from FTCA liability "[a]ny claim arising in a foreign country"). Moreover, the same considerations apply to injuries to civilians (including dependents) and to military members not injured "incident to service." *See, e.g., Johnson*, 481 U.S. at 696. The government asserts that a distinction drawn between permitting FTCA claims for domestic acts of negligence while precluding foreign-sited negligence would create "morale" problems (Opp. 17), but Congress specifically decided otherwise. And, whereas a service member might at least appreciate the logic of foreclosing *all* liability for foreign-sited negligence to civilians and military personnel alike, no justification attaches to the conceded court holdings that extend FTCA remedies to *civilians* for domestically based military negligence, while foreclosing service members from those same remedies for the same negligence.

Second, the government invokes the justification, thoroughly rebutted by the *Johnson* dissenters (481 U.S. at 697-98), that service members supposedly receive benefits that "compare extremely favorably" to workers' compensation schemes. Opp. 17. But it ignores *amici*'s demonstration that those benefits do not justify the *Feres* bar, particularly in light of the current state of the Veterans Administration. *See* Veterans Legal Support Center Amicus Br. 7-23.

Third, the government asserts that the supposed intrusion of the judiciary into "sensitive military affairs" (Opp. 18) justifies the *Feres* doctrine. Those arguments prove too little and too much. They prove too little because that same supposed intrusion will occur in cases involving military negligence commit-

ted against civilians, which the judiciary has long recognized that it can decide. *See* Pet. 27. And it proves too much, because medical malpractice claims, in particular, do not intrude on sensitive military affairs at all.

Finally, the government offers the textual argument that the FTCA applies "in the same manner and to the same extent as a private individual under like circumstances." Opp. 19 (quoting *Feres*, 340 U.S. at 141 (quoting 28 U.S.C. § 2674)). That is, in effect, a claim grounded not in the FTCA's exemptions, but in its broad *waiver* of sovereign immunity. As the *Johnson* dissent explained, however, this Court abandoned that mode of interpreting the FTCA – that government liability always requires the existence of "parallel private liability" – more than 50 years ago. *See* 481 U.S. at 694-95 (citing *Rayonier Inc. v. United States*, 352 U.S. 315, 319 (1957); *Indian Towing Co. v. United States*, 350 U.S. 61, 66-69 (1955)). And, in prior briefs to this Court defending *Feres*, the government has not sought to disinter that mode of analysis. Instead, implicitly conceding that the *Feres* doctrine has no textual basis, the government grounded the doctrine solely in the policy rationales of *Feres* and *Johnson*.[4] The government's attempt now to resurrect a long-rejected mode of statutory interpretation undermines its claim for fealty to statutory *stare decisis*: a reason for overturning a prior decision of this Court is a rejection of an interpretation's underpinnings. *See Neal v.*

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[4] *See, e.g.*, Resp. Br. 9-10, *Matthew v. Department of the Army*, No. 08-1461 (U.S. filed Aug. 7, 2009); U.S. Br. 9, *Costo v. United States*, No. 01-526 (U.S. filed Nov. 26, 2001); U.S. Br. 8-11, *Sonnenberg v. United States*, No. 90-539 (U.S. filed Dec. 24, 1990).

United States, 516 U.S. 284, 295 (1996). Moreover, although certain FTCA exceptions overlap with others – a discretionary function, of course, can occur in a foreign land as well as during war – petitioner's argument is not that the FTCA must be construed to achieve analytical separation between exceptions. *But see* Opp. 19-20. Rather, when none of the enumerated exceptions applies, the FTCA permits an action against the government.

4. The government incorrectly maintains (at 20) that this Court simply should ignore judges' repeated criticisms of the *Feres* doctrine. It does not deny that *Feres* – perhaps more than any other holding of this Court that has not yet been overruled – has been the subject of numerous and repeated calls by lower-court judges for this Court's reconsideration. Most have come after *Johnson*, confirming that *Johnson*'s reaffirmation of *Feres* did not settle the matter once and for all. *See* Pet. 21-22. The government's acknowledgment that companion cases to *Feres* involved medical malpractice claims *supports* granting this case to reconsider the doctrine, because it enables the Court to evaluate whether the justifications thought to be appropriate in 1950 for a judicially crafted substantive defense to the FTCA are still persuasive.

5. The government erroneously contends that SSgt. Witt's leave status provides no basis for reconsidering *Feres*. Not only was SSgt. Witt between units on military-ordered transfer status, but he was on official personal leave from duty the day he was injured (October 10, 2003). The government suggests there are cognizable differences for FTCA liability between "leave," "active duty" transfer status, and "medical hold" (Opp. 21-22), but those arguments

merely highlight the difficulties of administering the ambiguous "incident to service" test. FTCA liability should not rest on such fine and judicially created distinctions, and SSgt. Witt's family should not be denied FTCA remedies because he was on "leave" rather than "medical hold" when he fell victim to medical malpractice. *See, e.g., Parker v. United States*, 611 F.2d 1007, 1013-14 (5th Cir. 1990) (*Feres* not applicable to active-duty service members on 4-5 day pass).

The government also seeks to justify including medical malpractice within the *Feres* ambit (Opp. 22-23), but the doctrine's ostensible rationales are simply inadequate for malpractice claims. First, it is a misnomer to describe the medical care that service members receive as "free" (Opp. 22-23), because as an economic matter service members accept reduced wages for those benefits. Moreover, the difficulties of travel for doctors and other personnel who commit medical malpractice (Opp. 23) are certainly less significant than they were 60 years ago, particularly given technological advances in video-conferencing and air travel. To the extent those rationales apply at all in domestic situations, they apply to civilian and military personnel alike, yet *Feres* bars only the latter from recoveries that the former can obtain.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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